**C.I. HOLDINGS BHD.**

**v.**

**JABATAN PEMEGANG HARTA**

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[COMPANIES WINDING-UP NO. D4-42-504-88]
13 SEPTEMBER 1991

***LAND LAW:*** *Charge - Remedy to chargee - No power for receiver and manager to act.*

***LAND LAW:*** *Valuation - Whether proper - True market value - Duty of receiver and manager.*

***COMPANY LAW:*** *Receivership - Receivers and Managers - Appointed under debenture - Whether had power to sell assets of company - Fixed or floating charge - Duty - Whether land charged under National Land Code can be sold by receiver and manager.*

Several creditors and a former director of Sama Corp. Sdn. Bhd. (the company), sought to set aside an order granted by the Court on 9 July 1990 upon an application made by the receiver and manager of the company. That order authorises the receiver and manager to sell certain assets of the company.

The company was a customer of Mercantile Bank Ltd. (Mercantile Bank). In consideration of Mercantile Bank granting credit facilities to the company, the company created and executed a debenture (the said debenture) on 1 November 1973 in favour of Mercantile Bank. The company also created a charge (the said charge) dated 1 November 1973 under the National Land Code (NLC) in respect of land held under title EMR, Lot 513, Mukim of Petaling. Both the debenture and the charge were duly registered with the Registrar of Companies on 8 November 1973.

The debenture and the charge were subsequently transferred by Mercantile Bank to the Hong Kong and Shanghai Banking Corp. (HKSBC) for a consideration of RM1,000,000. The company was subsequently wound-up by the order of the Court dated 9 December 1988 on the ground that the company was unable to pay its debts. By a deed of appointment dated 22 November 1989, the HKSBC, pursuant to the said debenture, appointed Encik Abdul Samad bin Hj. Alias of Messrs. Arthur Anderson & Co., a receiver and manager of the charged assets to exercise all the powers of a receiver and manager authorised by the said debenture.

On 2 August 1990, the intervener (WZC) had entered into a sale and purchase agreement with the receiver whereby the latter agreed to sell the said land to the intervener.

It was argued that the receiver had no power or capacity under the debenture to sell the said land as the charge in this case was a floating charge, which was not covered under the NLC.

**Held:**

**[1]** Under a floating charge, the property which is the subject of a floating charge is not permanent and can change constantly from time to time; and a floating charge does not immediately, without the occurrence of the specified event, fasten to any existing property. A company can deal with property, which is the subject of a floating charge, until the creditor intervenes or some pre-defined event occurs to convert the floating charge into a fixed charge.

**[2]** The land in question was charged under the NLC and the charge was immediately fixed the moment it was registered. The charge is not a floating charge. Therefore the receiver and manager had no power to act under the debenture in respect of the charged land.

**[3]** According to the charge document, in the present case, the chargee is the HKSBC. Since the charge is under the NLC, the only remedy open to the chargee is under the provisions of the NLC. The land in question is held under a land office title that is EMR Land. This Court has no power to order the sale of Mukim land. In the present case it is the chargee and not the receiver and manager, who should apply for an order of sale of the land in accordance with the provisions of the NLC.

**[4]** Assuming the Court is wrong and the receiver can sell the land, the question is whether the sale was made at a price based on the true market value. On the evidence, when the order was made on 9 July 1990, there was no proper valuation of the property before the Court, and that being so the receiver and manager had failed to obtain the true market value of the said property when he made the application. Furthermore, a valuation made without showing how the value was arrived at was not proper and could be misleading.

**[5]** A receiver was under a duty to a guarantor of the mortgagor's debt to take reasonable care to obtain the true market value of the mortgaged property when he realised the property in the exercise of the power of sale. If he had done so, he was under no legal obligation to sell the property at the highest price.

*[Applications allowed with costs; order of 9 July 1990 set aside.]*

**Cases referred to:**
*Evans v. Rival Granite Quarries Ltd. [1910] 2 KB 979* ***(foll)***
*UMBC v. Official Receiver & Liquidator of Soon Hup Seng Sdn. Bhd. (In Liquidation) & Anor. [1986] 1 MLJ 75* ***(dist)***
*Tan Teng Pan v. Wong Fook Chang [1973] 1 MLJ 31* ***(foll)***
*Eu Finance Bhd. v. Sim Sen Organization Bhd. [1990] 1 CLJ (Rep) 361* ***(foll)***
*American Express International Banking Corp. v. Hurley [1985] 3 All ER 564* ***(foll)***
*Cuckmere Brick Co. Ltd. & Anor. v. Mutual Finance Ltd. [1971] 1 Ch 949* ***(foll)***

**Legislation referred to:**
National Land Code 1965, ss. 260, 261(1)

**Other sources referred to:**
*Bank Security Documents,* J.R. Lingard, 2nd Edn., p. 123
*Halsbury's, Laws of England,* 4th Edn., Vol. 7, p. 493

*For the applicant - V.J. Kumar (Jaspal with him); M/s. Kumar Jaspal & Quah*
*For Lim Tuck Fatt - R.R. Sethu; (M/s. R.R. Sethu and Khoo Phaik See with him); M/s. Khoo Naidu & Deol*
*For the creditors - K. Balaguru; M/s. A.K. Lee & Co.*
*For the interveners - W.S.W. Davidson; M/s. T/n. Azman, Davidson & Co.*
*For the official liquidators - O. Thaiyub Khan*

**JUDGMENT**

**Zakaria Yatim J:**

There are five similar applications before this Court.

The first application was filed by Teras Tenaga Industries Sdn. Bhd., a creditor of Sama Corp. Sdn. Bhd. (hereinafter referred to as "the company"). The second application was filed by Mr. Lim Tuck Fatt, the former director of the company (in liquidation). The third application

was filed by Concrete Industries (Johore) Sdn. Bhd., Morier (Malaysia). Sdn. Bhd. and Tas-Redland Tiles Sdn. Bhd.; who are also creditors of the company. The fourth application was filed by Sama Wira Mulpha Industries Sdn. Bhd., another creditor of the company. The fifth application was filed by Sama Corp. (KB) Sdn. Bhd., also a creditor of the company.

In all these five applications, the applicants are seeking the order of the Court (a) to set aside an order made by this Court on 9 July 1990; (b) that sales pertaining to the land held under EMR 3843, Lot 513, Mukim of Petaling (hereinafter referred to as the "said land") be stayed pending the outcome of their applications; (c) that notice be given to the other creditors of the company of their applications; and (d) that the costs of the applications be costs in the cause.

The order dated 9 July 1990, which the applicants seek to set aside, is as follows:

> **Upon the application** of the applicant **and upon reading** the summons in chambers dated 30 May 1990 and the affidavit of En. Abdul Samad bin Hj Alias affirmed 29 May 1990 and the affidavit of Mr. Jaspal Singh affirmed on 9 July 1990 filed herein **and upon hearing** Mr. Jaspal Singh of Counsel for the applicant and En. Mohd. Noor Alias for the official receiver abovenamed **it is ordered** that:
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> (i) the receiver and manager is at liberty to sell assets comprised in the debenture including but not limited to:
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> (a) land held under EMR 3843 Lot 513, Mukim of Petaling;
>
> (b) shares held in C.I. Holdings Sdn. Bhd. and Sama Corpn. Devpt. Sdn. Bhd.;
>
> (ii) the Senior Assistant Registrar of this Honourable Court do execute in the name of Sama Corp. Sdn. Bhd., such deeds and/or forms as are necessary to effect the discharge and transfer of the said assets upon application by the receiver and manager;
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> (iii) the Registrar of Land Title do and cause to be registered such instruments presented by the Receiver and Manager for the discharge of charge and transfer of title in respect of EMR 3843 Lot 513, Mukim of Petaling, Wilayah Persekutuan.
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> (iv) the official receiver/liquidator do deliver assets in or coming into his possession comprised in the charge given in the said debenture dated 1 November 1973 to the receiver and manager of Sama Corp. Sdn. Bhd.;
>
> (v) the costs of this application be provided for.
>
> Dated 9 July 1990.

Before the hearing of the applications, the Court heard another application by Messrs. Wang Zheng Corp. Sdn. Bhd., who applied to be added as an intervener in the matter. I allowed the application and Messrs. Wang Zheng Corp. Sdn. Bhd. was added as intervener in the applications.

The facts of the case are briefly as follows:

The company was a customer of Mercantile Bank Ltd. (Mercantile Bank). In consideration of Mercantile Bank granting credit facilities to the company, the company created and executed a debenture (the said debenture) on 1 November 1973 in favour of Mercantile Bank. The company also created a charge (the said charge) dated 1 November 1973 under the National Land Code in respect of land held under title EMR, Lot 513, Mukim of Petaling. Both the debenture and the charge were duly registered with the Registrar of Companies on 8 November 1973. The debenture and the charge were subsequently transferred by Mercantile Bank to the Hong Kong and Shanghai Banking Corpn. (HKSBC) for a consideration of RM1,000,000.

The company was subsequently wound-up by the order of the Court dated 9 December 1988 on the ground that the company was unable to pay its debts. By a deed of appointment dated 22 November 1989, the HKSBC, pursuant to the said debenture, appointed Encik Abdul Samad bin Hj. Alias of Messrs. Arthur Andersen & Co. a receiver and manager of the charged assets and he was to exercise all the powers of a receiver and manager given by the said debenture. On 30 May 1990 the receiver and manager filed an application by summons in chambers and on 9 July 1990, he obtained the order reproduced above, which the applicants are now asking the Court to set aside. On 2 August 1990, the intervener, Messrs. Wang Zheng Corp. Sdn. Bhd. entered into a sale and purchase agreement with the receiver and manager whereby the latter agreed to sell the said land to the intervener for an agreed price of RM1,687,500.

Mr. R.R. Sethu, Counsel for the applicant, Mr. Lim Tuck Fatt, the former director of the company, submitted that the receiver and manager had no capacity or power under the debenture to sell the said land. He said that the charge in respect of the land was a floating charge. It was not a fixed and floating charge. He added that there was already a separate charge under the National Land Code. He contended that a floating charge did not cover a charge under the National Land Code. According to him, a charge under the National Land Code was immediately fixed the moment it was charged. He further contended that a charge under the National Land Code was not a floating charge.

The first question for the Court to consider is whether the receiver and manager has the power to sell the land. Clause 2 of the debenture provides for a floating charge in respect of the said land. The clause states:

> 2. As security for the repayment on demand of the balance which on the current or other account or accounts of the company with the bank shall for the time being be owing as aforesaid, the company as beneficial owner hereby charges to the bank by way of **a floating charge** all its undertaking and other property and assets whatsoever and wheresoever both present and future including but not restricted to plant, equipment and machinery, stock-in-trade (including raw materials, work-in-progress and finished products), uncalled capital for the time being and book debts owing to the company at any time and from time to time.
> (Emphasis added)

The Court of Appeal in England in *Evans v. Rival Granite Quarries Ltd.* [1910] 2 KB 979 has discussed what is a floating charge. In his judgment at p. 993, 994 and 996, Fletcher Moulton LJ said:

> In the former case Lord Macnaghten says (3):
>
> > A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default.
>
> I call attention to the fact that Lord Macnaghten there lays down that which changes the character of a floating security to that of a fixed charge is either the cessation of the carrying on of business by the company or the actual intervention of the debenture-holder, but not his mere right to intervene. Mere default on the part of the company does not change the character of the security; the debenture-holder must actually intervene. This description of a floating charge, coming as it does from such a high authority, has been in general use in the Courts ...

> I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp. I think that Lord Macnaghten was here keeping in view the two characteristic features of floating charges - (1) the non-permanence of the property which is the subject of the charge, and its constant change from time to time, and (2) that a floating charge does not of itself fasten and settle even on the property existing at the moment. This explanation removes all difficulties arising from decisions which speak of a floating charge as an existing charge. It is an existing charge, and is rightly termed so, but care must be taken to remember that it has not settled down and fastened on the property which is the subject of the charge. I find no difficulty in grasping such a concept ... I now turn to the second and more modest line of argument, which is that, assuming that the debenture-holder in order to get priority must have turned his charge from a floating charge into a specific charge on the company's assets, he has done so in this case, because he gave a notice to the bank not to pay the judgment creditor and claimed the balance lying at the bank. In my opinion that argument is fallacious. A security of this kind must be either floating or fixed. While it is a floating security the company has a right, not a mere licence, to carry on its business until the debenture-holder intervenes, and when the debenture-holder does intervene he must do so with the intention of making his security a fixed security. In my opinion it is a breach of contract on the part of the debenture-holder to interfere in the conduct of the business so long as his security is only a floating security.

Buckley LJ in the same case said at p. 999:

> The outcome of the decisions may be thus summarized. A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.

From the passages quoted above, it is clear that a fixed charge immediately attaches and binds the property, the subject of the charge, at the time of the creation of the charge. A floating charge, however, does not immediately attach to or bind any definite property at the time of the property, which is the subject of a floating charge, until the creditor intervenes or some pre-defined event occurs to convert the floating charge into a fixed charge.

There are thus two characteristic features of a floating charge not found in a fixed charge. Firstly, the property, the subject of a floating charge is not permanent and can change constantly from time to time; and secondly, a floating charge does not immediately, without the occurrence of the specified event, fasten to any existing property.

I agree with Mr. Sethu that a floating security is not covered by a fixed charge. In the present case, the receiver and manager has no capacity or power to invoke the debenture where the charge is a fixed charge. According to J.R. Lingard, in his book "*Bank Security Documents*, 2nd Edn., at p. 123:

> ... Because the floating charge is 'incomplete' and 'dormant' until it crystallises, subsequent fixed charges (whether legal or equitable) in the ordinary course of business even with notice of the floating charge will take priority over it, subject to para. 9.7 below (*Re Hamilton's Windsor Ironworks, ex p Pitman and Edward*).
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> The rule was explained by North J in these words in *Wheatley v. Silkstone and Haigh Moor Coal Co.*
>
> In this case I find that the debenture is intended to be a general floating security over all the property of the company, as it exists at the time when it is to be put in force; but it is not intended to prevent and has not the effect of in any way preventing the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course; and, in as much as I find that in the ordinary course of business and for the purpose of the business this mortgage was made, it is a good mortgage upon and a good charge upon the property comprised in it, and is not subject to the claim created by the debentures.

Mr. Davidson, Counsel for the intervener, submitted that although the debenture provided for a floating charge it became a fixed charge when the receiver and manager was appointed. He referred to Halsbury's *Laws of England*, 4th Edn., Vol. 7 at p. 493 where it is stated:

> If the company is wound-up, or if a receiver is appointed or some event happens upon which the charge is to become a fixed charge, the security ceases to be a floating security and becomes a fixed charge and the company cannot thereafter deal with any part of the property so charged except subject to the charge ...

Mr. Davidson next referred to the case of *UMBC v. Official Receiver & Liquidator of Soon Hup Seng Sdn. Bhd. (In Liquidation) & Anor.* [1986] 1 MLJ 75. He referred to the judgment of the learned Judge at p. 82, where the learned Judge said:

> Nevertheless, albeit with some diffidence, I hold that a debenture is an altogether different class of document from a charge under the Code. The floating charge is in fact over unspecified property. When it crystallises it attaches itself to the company's land as much as it does to its chattles and personalty. If the document is to be commercially effective the debenture holder should be permitted to move with due expedition. It has not been suggested to me by Mr. Ong that once the floating charges crystallises, that part of it which attaches itself to land must be regarded as a fixed charge of land thereby requiring registration under the Code. Indeed it is difficult to envisage how that could be done. But what is being suggested is that in so far as sale is concerned the debenture is on a par with a charge under the Code.
>
> With respect, I am unable to follow. The power to sell under the debenture arises by virtue of the contractual provisions of the debenture itself. In this case Clause 10 of the debenture is relevant. So is s. 206(3) of the Code which expressly reserves the contractual operation of any transaction relating to alienating land.

I do not disagree with the passage quoted above. But in that case, under the debenture there was a fixed and floating charge.

In the present case, the land in question was charged under the National Land Code and the charge was immediately fixed the moment it was registered. The charge is not a floating charge. Therefore the receiver and manager had no power to act under the debenture in respect of the charged land.

According to the charge document, in the present case, the chargee is the HKSBC. Since the charge is under the National Land Code, the only remedy open to the chargee is under the provisions of the National Land Code. The land in question is held under a land office title that is EMR Land. This Court has no power to order the sale of Mukim land. In *Tan Teng Pan v. Wong Fook Chang* [1973] 1 MLJ 31, the chargee sought for an order of

sale of land held under EMR in the Mukim of Klang for the recovery of the sum of RM6,000 due by the chargor to the chargee under a charge which was duly registered by the Collector of Land Revenue, Klang. The question before the Court was whether the Court had jurisdiction to entertain the application when the land in question was land held under a land office title. The Court decided that in view of the provisions of ss. 260 and 261(1) of the National Land Code, the Court had no jurisdiction to entertain the application.

In the present case it is the chargee and not the receiver and manager, who should apply for an order of sale of the land in accordance with the provisions of the National Land Code.

If I am wrong in concluding that the receiver and manager has no capacity or power to apply for an order of sale of the land, the next question to consider is whether the receiver and manager was selling the land at a price based on the true market value?

When the receiver and manager filed the application, he exhibited the following valuation reports. One was a letter written by Messrs. Henry Butcher to Messrs. Arthur Anderson and Co. dated 2 April 1990. That letter stated that the forced sale value of the land was RM1,870,000. It was on the basis of that letter that the receiver and manager found a buyer for the land for RM1,875 million. Another was a valuation report purported to be prepared by Messrs. Henry Butcher. In that report it was stated that the "Fair Market value of the freehold unencumbered interest in the subject property with the benefit of vacant possession is RM1,875." In this report the valuers purported to have adopted the comparison method but the report did not show any evidence of values of comparative properties. The report was not even signed by Messrs. Henry Butcher.

I agree with Mr. Sethu that Messrs. Henry Butcher's valuation was defective. The report did not disclose the comparable basis for the valuation. In *Eu Finance Bhd. v. Sim Sen Organization Bhd.* [1990] 1 CLJ (Rep) 361, the Court decided that a valuation made without showing how the values was arrived at was not proper and could be misleading. I respectfully agree with that decision.

Another valuation was prepared by the government. The government valuation report stated that the open market value of the land was RM3.3 million. This was not acceptable to the receiver and manager as the valuation did not give any basis as to how the open market value was arrived at.

The other valuation was by Messrs. Raine and Horne Zaki and Partners. In their report dated 6 July 1990, the open market value of the property without vacant possession was RM1,920,000 and with vacant possession was RM2,300,000. The forced sale value was RM1,920,000. Mr. Lim Tuck Fatt in his affidavit affirmed on 25 October 1990 averred that there was a very significant discrepancy in the report. In para. 22 of the affidavit, he said:

> 22 (a) In reply to paras.19 & 20 of the affidavit in reply I wish to refer to the said valuation report by Messrs. Zaki & Partners dated 9 July 1990. ("JS1").
>
> (b) On p. 15, the report states that land along 19th kilometre Jalan Puchong is being transacted between RM100 to RM140 per sq. metre, i.e., RM9.29 to RM13.01 per sq. ft.
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> (c) The property in question is located at 11.2 kilometre Jalan Puchong, and hence being much closer to the City should fetch a higher value.
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> (d) In fact the report on p. 15 goes on to say that a comparable property having an area of 2415.53 sq. metres was sold for RM900,000 on 1 November 1988. This equates to RM372.58 per sq. metre or RM34.62 per sq. ft.

(e) Messrs. Zaki & Partners then goes on to place a fair market value of RM2,300,000 on the said land which equates to only RM141.55 per sq. metre or RM13 per sq. ft.

(f) This value is significantly lower than the sale value obtained on the comparable property which was sold in 1988 when property values were still depressed.

(g) This reveals a very significant discrepancy in the report.

The above averment has not been disputed.

There were two other valuation reports which were not brought to the attention of the Court when the receiver and manager made his application. Both these valuation reports were prepared by W.M. Malik & Lee. The first valuation by Malik & Lee was dated 11 April 1988. According to that report the forced sale value of the said land was RM6,000,000. The second report by Malik & Lee, dated 13 August 1986 was to update the value of the said property. In the second report the forced sale and value of the said land was RM4,000,000. After the order dated 9 July 1990 was made, Malik & Lee made further valuation on the said property. In their valuation report dated 14 September 1990, the forced sale value of the said land was RM4,200,000.

Having seen all the valuation reports, I am now of the view that when the order was made on 9 July 1990, there was no proper valuation of the property before the Court. From the various valuation reports I have just referred to, it is clear that the receiver and manager had failed to obtain the true market value of the said property when he made the application. In *American Express International Banking Corpn. v. Hurley* [1985] 3 All ER 564, it was held that a receiver was under a duty to a guarantor of the mortgagor's debt to take reasonable care to obtain the **true market value** of the mortgaged property when he realised the property in the exercise of the power of sale. In *Cuckmere Brick Co. Ltd. & Anor. v. Mutual Finance Ltd.* [1971] 1 Ch 949, Salmon LJ, in his judgment at p. 966, said:

> There are other *dicta* which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: ... The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law. Approaching the matter first of all on principle, it is to be observed that if the sale yields a surplus over the amount owed under the mortgage, the mortgagee holds this surplus in trust for the mortgagor. If the sale shows a deficiency, the mortgagor has to make it good out of his own pocket. The mortgagor is vitally affected by the result of the sale but its preparation and conduct is left entirely in the hands of the mortgagee. The proximity between them could scarcely be closer. Surely they are "neighbours". Given that the power of sale is for the benefit of the mortgagee and that he is entitled to choose the moment to sell which suits him, it would be strange indeed if he were under no legal obligation to taken reasonable care **to obtain what I call the true market value at the date of the sale.**

It is true that if the receiver and manager took reasonable care to obtain the true market value at the time of the sale of the said property, he was under no legal obligation to sell the property at the highest price. See *Cuckmere* case at p. 965. Mr. V. Kumar, Counsel for the receiver and manager rightly said that the obligation of the receiver and manager was to obtain only the market value at the time of sale. According to him, at the time of sale, the receiver and manager had a valuation by Messrs. Henry Butcher. With respect, as I pointed out earlier, Messrs. Henry Butcher's valuation report was defective and could not be relied upon. Mr. Kumar also referred to the valuation report prepared by Messrs. Raine & Horne Zaki & Partners. This report, too cannot be relied upon because there was a very significant discrepancy in it.

In the circumstances there is no evidence to show that the price of RM1,875,000 was the true market value of the said land when the receiver and manager applied for the order dated 9 July 1990.

For the reasons stated above I allow all the five applications with costs and set aside the order dated 9 July 1990.

Also found at [1992] 1 CLJ 109